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No. 79-789

In the Supreme Court of the United States

OCTOBER TERM, 1979

DANIEL FATICO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ROBERT J. ERICKSON
LOUIS M. FISCHER
Attorneys
Department of Justice
Washingon, D.C. 20530

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 603 F. 2d 1053. The opinion of the district court is reported at 458 F. Supp. 388. Prior opinions of the court of appeals and of the district court are reported respectively at 579 F. 2d 707 and 441 F. Supp. 1285.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1979. A petition for rehearing was denied on October 5, 1979 (Pet. App. 12a). On October 29, 1979, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to November 20, 1979, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in imposing sentence, the district court properly considered hearsay evidence of petitioner's involvement in organized crime.

2. Whether the Jencks Act, 18 U.S.C. 3500, applies at a sentencing proceeding to require production of information provided by confidential informants to law enforcement officers who testify at the sentencing hearing.

STATEMENT

Petitioner was indicted in the United States District Court for the Eastern District of New York on various charges arising from the hijacking of three trucks and their contents at Kennedy Airport in New York. Petitioner eventually pleaded guilty to one count of conspiracy to possess items stolen from a foreign shipment, in violation of 18 U.S.C. 371, and was sentenced to four years' imprisonment. The court of appeals affirmed (Pet. App. 1a-11a).

1. In connection with petitioner's sentencing, the government advised the district court that it intended to introduce information from confidential informants, through the testimony of FBI agents, that petitioner was a member of an organized crime family (Pet. App. 3a). The district court refused to allow such evidence. *United States* v. *Fatico*, 441 F. Supp. 1285 (E.D.N.Y. 1977). On the government's appeal, the court of appeals reversed. Although recognizing that the Due Process Clause was implicated at sentencing, the court held that not all evidentiary limitations applicable at trial were required to be observed at the sentencing stage and that the hearsay testimony contemplated by the government's proffer would be admissible if sufficiently corroborated. *United States* v. *Fatico*, 579 F. 2d 707, 711-713 (2d Cir. 1978); see also Pet. App. 3a-5a.

2. On remand, the district court held an evidentiary hearing at which seven law enforcement officers (including four FBI agents) testified (Pet. App. 5a). These officers collectively related information from 17 different informants that petitioner was a full member of the Gambino family, one of the five organized crime families in the New York metropolitan area (*ibid*; see also *United States* v. *Fatico*, 458 F. Supp. 388, 412 (E.D.N.Y. 1978)). The district court found this testimony "highly probative. Even if one or several of these experienced agents miscalculated the reliability of an informant, the large number of agents and informants, greatly reduces the margin for error." 458 F. Supp. at 412. The district court concluded that this proof met the government's "rigorous burden" to provide " 'clear, unequivocal and convincing evidence,' " and it found that the "probability is at least 80% that [petitioner] is an active member of an organized crime family." *Ibid.* As a result, instead of sentencing petitioner to a three-year term concurrent with a prior sentence on a federal gambling conviction, the district court imposed a sentence of four years' imprisonment consecutive to the earlier sentence. *Id.* at 412-413; Pet. App. 7a. The court of appeals affirmed, rejecting petitioner's claims that the use of the hearsay testimony deprived him of due process and that the Jencks Act was applicable at the sentencing hearing (Pet. App. 1a-11a).

ARGUMENT

1. Petitioner contends that the sentencing proceeding deprived him of due process because he was not afforded an opportunity to cross-examine the confidential informants whose information was conveyed through the testimony of the FBI agents (Pet. 11-16) and because the

hearsay evidence was not sufficiently reliable to be admitted at the sentencing proceeding (Pet. 16-18).[1]

The court of appeals agreed with petitioner that "'[t]he Due Process Clause is plainly implicated at sentencing'" (Pet. App. 3a, quoting *United States* v. *Fatico*, 579 F. 2d 707, 711 (2d Cir. 1978)). "[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *Gardner* v. *Florida*, 430 U.S. 349, 358 (1977) (plurality opinion). Cf. *Presnell* v. *Georgia*, 439 U.S. 14, 16 (1978). However, "[t]he fact that due process applies does not, of course, implicate the entire panoply of criminal trial procedural rights." *Gardner* v. *Florida*, *supra*, 430 U.S. at 358 n.9.

It is well settled that the Due Process Clause does not prohibit the use of hearsay evidence at a sentencing proceeding or require that the convicted defendant be allowed to cross-examine the source of such information. "[O]nce the guilt of the accused has been properly established, the sentencing judge, in determining the kind and extent of punishment to be imposed, is not restricted to evidence derived from the examination and cross-examination of witnesses in open court but may,

[1]As the court of appeals noted (Pet. App. 3a n.1), petitioner does "not challenge the materiality of information as to his links to organized crime * * *." Nor could such an objection be sustained in light of 18 U.S.C. 3577, which provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." Section 3577 "was enacted in order to clearly authorize the trial judge to rely upon information of alleged criminal activity for which the defendant had not been prosecuted * * *." *Smith* v. *United States*, 551 F. 2d 1193, 1196 (5th Cir.), cert. denied, 434 U.S. 830 (1977). See also *United States* v. *Garcia*, 544 F. 2d 681, 684 (3d Cir. 1976).

consistently with the Due Process Clause of the Fourteenth Amendment, consider responsible unsworn or 'out-of-court' information relative to the circumstances of the crime and to the convicted person's life and characteristics." *Williams* v. *Oklahoma*, 358 U.S. 576, 584 (1959). As the Court explained in *Williams* v. *New York*, 337 U.S. 241, 246-247, 249-250 (1949) (footnotes omitted):

> Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations. But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.
>
> * * * * *
>
> Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. These rules rest in part on a necessity to prevent a time-consuming and confusing trial of collateral issues. They were also designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct. A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly

relevant—if not essential to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

* * * * *

To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation. We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination.

See also *United States* v. *Grayson*, 438 U.S. 41, 49 (1978). Thus, "before making [the sentencing] determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U.S. 443, 446 (1972), quoted in *United States* v. *Grayson*, *supra*, 438 U.S. at 50.[2]

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[2]As *Grayson* indicates, *Gardner* v. *Florida* does not repudiate this longstanding rule of due process. The court of appeals correctly observed (Pet. App. 4a n.2) that the judge in *Gardner* had not disclosed the substance of the hearsay evidence, while in *Williams* v. *New York* "the material facts * * * were described in detail by the trial judge in open court" (430 U.S. at 356). Moreover, the decision in *Gardner* seems limited, as the court of appeals concluded (Pet. App. 4a n.2), to capital cases. See 430 U.S. at 357-358; see also *Presnell* v. *Georgia*, *supra*, 439 U.S. at 16 ("These fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial *in a capital case* than they do in the guilt-determining phase of any criminal trial. Cf. *Gardner* v. *Florida*, 430 U.S. 349 (1977).") (emphasis added).

This Court and the courts of appeals have uniformly held that a sentencing judge may consider hearsay evidence, analogous to the evidence in this case, that the defendant was associated with organized crime or was a ringleader in extensive criminal activity, that he constituted a danger to society, or that he had committed unrelated crimes for which he had not been convicted. See, *e.g.*, *Williams* v. *New York*, *supra*, 337 U.S. at 244 (information that defendant had committed 30 burglaries for which he had not been convicted and that he was a "menace to society"); *Farrow* v. *United States*, 580 F. 2d 1339, 1353-1354 n.25, 1359-1360 (9th Cir. 1978) (information that defendant was the ringleader of a large

Nor, contrary to his assertion (Pet. 13-14), is petitioner's position supported by *Specht* v. *Patterson*, 386 U.S. 605 (1967). In that case, the defendant was convicted of the crime of indecent liberties, which conviction served as the predicate for a separate commitment proceeding and sentence under the Sex Offenders Act. The Court framed the issue presented in *Specht* as "whether the rule of * * * [*Williams* v. *New York*] applies to this * * * case * * *" (386 U.S. at 607). The Court expressly adhered to its decision in *Williams* (386 U.S. at 608) but declined to extend the *Williams* rule to a case where, akin to a recidivist or habitual offender statute (386 U.S. at 610), "[t]he Sex Offenders Act does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under another Act" (386 U.S. at 608). Since the present case involves only a single statutory proceeding, petitioner's reliance on *Specht* is unavailing. Rather, petitioner is in the same position as any defendant faced at sentencing with damaging information about his background, and this case is controlled by the *Williams* rule as explicitly reaffirmed in *Specht*.

narcotics operation); *United States* v. *Wondrack*, 578 F. 2d 808, 809-810 (9th Cir. 1978) (report that defendant convicted of attempted tax evasion had received substantial income from trafficking in narcotics); *United States* v. *Ashley*, 555 F. 2d 462, 466 (5th Cir.), cert. denied, 434 U.S. 869 (1977) (information regarding defendant's prior conduct); *United States* v. *Garcia*, 544 F. 2d 681, 684 (3d Cir. 1976) (allegations concerning unrelated criminal conduct); *United States* v. *Cardi*, 519 F. 2d 309, 313 (7th Cir. 1975) (information regarding defendant's associates, sources of income, and prior criminal conduct); *United States* v. *Needles*, 472 F. 2d 652, 657-658, 659 (2d Cir. 1973) (report that defendant was engaged in widespread manufacture and sale of firearms).

The rule consistently recognized in these and other decisions is that due process is satisfied where the court determines that the hearsay is reliable, and the defendant is given the opportunity to rebut the accuracy of the information. However, "[t]he right of rebuttal does not require that the sentencing hearing be transformed into a second trial. * * * At a minimum, it is sufficient if the sentencing judge affords the defendant an opportunity to comment on any alleged factual inaccuracies." *United States* v. *Barnett*, 587 F. 2d 252, 259-260 (5th Cir. 1979) (citations omitted), cert. denied, No. 78-1267 (Apr. 23, 1979). See also Fed. R. Crim. P. 32(c)(3)(A) ("[T]he court shall afford the defendant or his counsel an opportunity to comment [on the presentence report] and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report.").[3]

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[3] *United States* v. *Weston*, 448 F. 2d 626 (9th Cir. 1971), cert. denied, 404 U.S. 1061 (1972), on which petitioner relies (Pet. 15-16), is not to the contrary. Unlike the instant case (see page 10, *infra*), the court in *Weston* found that the hearsay statements at issue there were uncorroborated and unverified (448 F. 2d at 630-631) and that

Moreover, there was a compelling reason in this case to allow the use of hearsay evidence. To have required the confidential informants to appear for cross-examination by petitioner would have ignored the strong societal interest in protecting the safety and anonymity of such informants. The danger of retaliation against persons who provide information concerning alleged organized crime figures is especially acute. These considerations are recognized in Fed. R. Crim. P. 32(c)(3)(A), which, as amended in 1974, provides that the defendant or his counsel shall be allowed to read the presentence report, "but not to the extent that in the opinion of the court the report contains * * * any * * * information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons." In this context, there is particular force to the concern "that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination." *Williams* v. *New York*, *supra*, 337 U.S. at 250.[4]

"the factual basis for believing the * * * [hearsay evidence] was almost nil" (*id.* at 633). The Ninth Circuit has interpreted *Weston* to be limited to "a sentence explicitly based upon unverified, unreliable charges of very serious criminal conduct." *Farrow* v. *United States*, 580 F. 2d 1339, 1358 (9th Cir. 1978). See also *United States* v. *Wondrack*, 578 F. 2d 808, 809 (9th Cir. 1978) (under *Weston*, "sentence may be reviewed and vacated when it is premised on allegations of serious criminal conduct and 'the factual basis for believing the charge [is] almost nil' ").

[4] *Roviaro* v. *United States*, 353 U.S. 53 (1957), on which petitioner relies (Pet. 11-12), is inapplicable here. The balancing test of *Rovario* is confined to the trial stage of a criminal prosecution "where the issue [is] the fundamental one of innocence or guilt." *McCray* v. *Illinois*, 386 U.S. 300, 309 (1967). This Court has never applied *Roviaro* to a sentencing hearing, and petitioner cites no support for the proposition that it should apply.

In the instant case, the court of appeals correctly held that "Due Process does not prevent use in sentencing of out-of-court declarations by an unidentified informant where there is good cause for the non-disclosure of his identity and there is sufficient corroboration by other means" (Pet. App. 4a, quoting 579 F. 2d at 713). Petitioner was apprised of the substance of the information offered against him and was afforded the opportunity, which he fully utilized, to refute the accuracy of that information. Finally, the court of appeals found that "there was more than ample evidence to corroborate * * * the information that the undisclosed informers supplied" (Pet. App. 8a-9a); indeed, as the district court concluded (458 F. Supp. at 412):

> The fact that seven different government agents, four of them from the FBI, relying on a total of seventeen independent informants, testified that [petitioner] was a member of the Gambino family, is, in the court's view, highly probative. Even if one or several of these experienced agents miscalculated the reliability of an informant, the large number of agents and informants, greatly reduces the margin for error. There are also the independent police observations of the defendant and his associates consorting with criminals. * * * While we must remain dubious of any conclusions based upon hearsay, the Government's proof here meets the rigorous burden of "clear, unequivocal and convincing evidence." The probability is at least 80% that [petitioner] is an active member of an organized crime family.

In these circumstances, review by this Court is unwarranted.

2. Petitioner also argues (Pet. 18-21) that the Jencks Act (18 U.S.C. 3500) applies at a sentencing hearing.[5]

The court of appeals correctly rejected this assertion (Pet. App. 11a). The Jencks Act refers only to the production of the statements of a witness "in a[ ] criminal prosecution" who has "testified * * * in the trial of the case" (18 U.S.C. 3500(a)). The courts of appeals have consistently held that the "trial of the case" in a criminal prosecution means the proceeding to determine a defendant's guilt or innocence. See *United States* v. *Bernard*, No. 78-3033 (9th Cir. Sept. 27, 1979); *United States* v. *Murphy*, 569 F. 2d 771 (3d Cir.), cert. denied, 435 U.S. 955 (1978); *United States* v. *Spagnuolo*, 515 F. 2d 818 (9th Cir. 1975); *United States* v. *Sebastian*, 497 F. 2d 1267 (2d Cir. 1974); *United States* v. *Percevault*, 490 F. 2d 126 (2d Cir. 1974); *United States* v. *McMillen*, 489 F. 2d 229 (7th Cir. 1972), cert. denied, 410 U.S. 955 (1973); *United States* v. *Montos*, 421 F. 2d 215 (5th

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[5]It is not clear that the material at issue here is subject to production under the Jencks Act in any event. Petitioner presumably seeks either documents provided to the testifying FBI agents by confidential informants or the agents' written notes of information orally furnished by the informants. The Jencks Act, however, requires production only of a witness' "statement," which is defined in pertinent part as "(1) a written statement made by said witness and signed or otherwise adopted or approved by him" or "(2) a * * * recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement" (18 U.S.C. 3500(e)). Since the informants did not appear as witnesses, the material they provided either in writing or as recorded and transcribed would not be subject to production. Likewise, the agents' notes of the informants' information would not be producible unless these notes were found to be the agents' (rather than the informants') statements. Thus, it is unlikely that the material in question would have been producible even if the Jencks Act were to apply at a sentencing hearing.

Cir.), cert. denied, 397 U.S. 1022 (1970); *United States* v. *Covello*, 410 F. 2d 536 (2d Cir.), cert. denied, 396 U.S. 879 (1969). Petitioner has cited no case, and we are aware of none, that indicates that the Jencks Act is applicable to the sentencing stage of a criminal prosecution.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ROBERT J. ERICKSON
LOUIS M. FISCHER
Attorneys

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[6]Petitioner's reliance (Pet. 20-21) on *United States* v. *White*, 342 F. 2d 379 (4th Cir.), cert. denied, 382 U.S. 871 (1965), and *United States* v. *Kelly*, 269 F. 2d 448 (10th Cir. 1959), cert. denied, 362 U.S. 904 (1960), is misplaced. Whatever the correctness of these decisions (compare, *e.g.*, *Beavers* v. *United States*, 351 F. 2d 507 (9th Cir. 1965)), they recognize at most that the Jencks Act might be applicable in a proceeding under 28 U.S.C. 2255. Unlike a sentencing hearing, a Section 2255 proceeding is an action separate from the criminal prosecution that can be similar in nature to a trial and involve questions concerning the defendant's guilt or innocence. Moreover, the defendants in *White* and *Kelly* were ultimately denied the relief requested under the Jencks Act. These decisions provide no support for the view that the Jencks Act is applicable to the sentencing stage of a criminal prosecution.

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